A **POSITIVE VISION LABUAN LIMITED**

**v.**

**KETUA PENGARAH HASIL DALAM NEGERI & OTHER APPEALS**

B

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
AZIAH ALI JCA
MAH WENG KWAI JCA

C [CIVIL APPEALS NO: W-01-67-02-2013, W-01-68-02-2013 & W-01-69-02-2013]
27 JUNE 2014

***REVENUE LAW:*** *Income Tax - Exemption - Companies involved in*
D *business of investment holding - Irrevocable elections made under s. 3A Labuan Offshore Business Activity Tax Act 1990 to be taxed under Income Tax Act 1967 ('ITA') - Director General of Inland Revenue ('DGIR') informed companies that exemptions from tax under ITA no longer available - Application for judicial review against decision of*
E *DGIR - High Court held that exemption order did not apply to companies with effect from respective dates of their election - Appeal against decision of High Court - Whether exemption order would apply to all offshore companies*

F ***CIVIL PROCEDURE:*** *Judicial review - Certiorari - Director General of Inland Revenue ('DGIR') decision against tax exemption - Application for judicial review against decision of DGIR – Whether companies qualified for exemption under ITA - Whether DGIR's decision legal and constitutional - Rules of the High Court 1980, O. 53*

G ***WORDS & PHRASES:*** *'Chargeable offshore company' - Whether referred to offshore companies which had made election - Whether companies fell under s. 3A of Labuan Offshore Business Activity Tax Act 1990 and s. 3B of Income Tax Act 1967 - Whether companies proved that exemption order applied to them*

H

The appellants in the present appeals were in the business of investment holding and were known as 'Labuan companies' and 'Labuan entities' under the Labuan Offshore Business Activity Tax Act 1990 ('LOBATA'). In 2011, after receiving their respective
I dividends, the appellants made irrevocable elections under s. 3A of the LOBATA to be taxed under the Income Tax Act 1967

('ITA'). The respondent informed the appellants that the Ministry of Finance had decided that as a matter of policy, effective from 12 February 2010, exemptions from tax under the ITA were no longer available to Labuan entities which had made elections under s. 3A of the LOBATA. Dissatisfied with the respondent's decision, the appellants applied for judicial reviews at the High Court under O. 53 of the Rules of the High Court 1980 ('RHC') seeking (i) a *certiorari* order to quash the respondent's decision; (ii) a declaration that the appellants were qualified for the exemption under ITA; and (iii) a declaration that the respondent's decision was illegal and unconstitutional and thus, null and void. In dismissing the appellants' application, the High Court held that the exemption order did not apply to the appellants with effect from the respective dates of their election. Hence, the present appeal. The appellants submitted that the exemption order would apply to all offshore companies that come within the meaning assigned under the LOBATA and ss. 3A and 3B of the same Act did not affect the application of the Income Tax (Exemption) Order 2007 ('the exemption order').

**Held (dismissing appeals with costs)**
**Per Aziah Ali JCA delivering the judgment of the court:**

**(1)** There was no ambiguity as to the meaning of s. 3B of the ITA. In considering s. 3B of the ITA, it is clear that through the amendments made, the Parliament intended to distinguish between an offshore company which has made the election under s. 3A(1) of the LOBATA as opposed to those companies which did not. The words 'chargeable offshore company' refer to offshore companies which had made the election. Section 3B clearly provides that 'chargeable offshore companies' are subject to tax under the ITA. (paras 37 & 38)

**(2)** The exemption order is a statutory order made under powers delegated to the Minister and must necessarily be read subject to and consistent with the provisions of the substantive or parent Act. The exemption order applies only to 'offshore company' which must be interpreted as defined under the ITA. The appellants, being 'chargeable offshore companies', failed to show that the exemption order applies to them. (paras 39 & 40)

***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu-perayu dalam rayuan-rayuan ini terlibat dalam perniagaan pemegangan pelaburan dan dikenali sebagai 'syarikat-syarikat Labuan' dan 'entiti-entiti Labuan' di bawah Akta Cukai Aktiviti Perniagaan Luar Pesisir Labuan 1990 ('LOBATA'). Pada tahun 2011, selepas menerima dividen masing-masing, perayu-perayu membuat pemilihan-pemilihan yang tidak boleh dibatalkan di bawah s. 3A LOBATA untuk dikenakan cukai di bawah Akta Cukai Pendapatan 1967 ('ITA'). Responden memaklumkan kepada perayu-perayu bahawa Kementerian Kewangan telah memutuskan sebagai satu hal perkara polisi, berkuatkuasa dari 12 Februari 2010, bahawa pengecualian-pengecualian daripada taksiran di bawah ITA tidak lagi wujud bagi entiti-entiti Labuan yang membuat pemilihan di bawah s. 3A LOBATA. Tidak berpuas hati dengan keputusan responden, perayu-perayu memohon bagi semakan-semakan kehakiman di Mahkamah Tinggi, di bawah A. 53 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT') memohon (i) satu perintah *certiorari* untuk membatalkan keputusan responden; (ii) satu deklarasi bahawa perayu-perayu layak bagi pengecualian di bawah ITA; dan (iii) satu deklarasi bahawa keputusan responden adalah tidak sah dan tidak berperlembagaan dan oleh itu, tidak sah dan batal. Dalam menolak permohonan perayu-perayu, Mahkamah Tinggi memutuskan bahawa perintah pengecualian tersebut tidak terpakai kepada perayu-perayu berkuatkuasa dari tarikh pemilihan masing-masing. Oleh itu, rayuan ini. Perayu-perayu menghujahkan bahawa perintah pengecualian akan terpakai kepada kesemua syarikat-syarikat luar pesisir yang terjumlah di bawah maksud yang dinyatakan di bahawa LOBATA dan ss. 3A dan 3B Akta yang sama tidak memberi kesan kepada pemakaian Perintah Cukai Pendapatan (Pengecualian) 2007 ('perintah pengecualian').

**Diputuskan (menolak rayuan-rayuan dengan kos)**
**Oleh Aziah Ali HMR menyampaikan penghakiman mahkamah:**

**(1)** Tiada kesamaran dalam maksud s. 3B ITA. Dalam mempertimbangkan s. 3B ITA, adalah jelas melalui pindaan-pindaan yang dibuat, Parlimen berniat untuk membezakan antara syarikat luar pesisir yang membuat pemilihan di bawah s. 3A(1) LOBATA dengan syarikat-syarikat yang tidak. Perkataan-perkataan 'syarikat luar pesisir yang boleh dikenakan cukai' merujuk kepada syarikat-syarikat luar pesisir yang

membuat pemilihan. Seksyen 3B jelas memperuntukkan bahawa 'syarikat-syarikat luar pesisir yang boleh dikenakan cukai' adalah tertakluk kepada cukai di bawah ITA.

**(2)** Perintah pengecualian adalah perintah statutori yang dibuat berdasarkan kuasa yang diberikan kepada Menteri dan semestinya dibaca tertakluk dan selaras dengan peruntukan-peruntukan Akta substantif atau induk. Perintah pengecualian hanya terpakai kepada 'syarikat luar pesisir' yang mesti ditafsirkan sebagaimana yang ditafsirkan di bawah ITA. Perayu-perayu, sebagai 'syarikat-syarikat yang boleh dikenakan cukai', gagal menunjukkan bahawa perintah pengecualian terpakai kepada mereka.

**Case(s) referred to:**

*Cape Brandy Syndicate v. Inland Revenue Commissioners [1921] 1 KB 64* ***(refd)***

*Generation Products Sdn Bhd v. Majlis Perbandaran Klang [2008] 5 CLJ 417 FC* ***(refd)***

*Krishnadas Achutan Nair & Ors v. Maniyam Samykano [1997] 1 CLJ 636 FC* ***(refd)***

*National Land Finance Co-Operative Society Ltd v. Director General of Inland Revenue [1993] 4 CLJ 339; [1993] 4 BLJ 33 SC* ***(refd)***

*Muthukamaru Veeriah v. Pemungut Duti Harta Pusaka [2003] 4 CLJ 561 CA* ***(refd)***

*Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265* ***(refd)***

*WT Ramsay Ltd v. Inland Revenue Commissioners [1982] AC 300* ***(refd)***

**Legislation referred to:**

Federal Constitution, art. 96

Finance Act 2011, s. 3(1)

Income Tax Act 1967, ss. 2, 3A, 3B, 4, 70, 71, 127(3)(b)

Interpretation Acts 1948 and 1967, s. 17A

Labuan Offshore Business Activity Tax Act 1990, ss. 2(3)(d), 3, 3A(1), 72

Rules of the High Court 1980, O. 53

*For the appellants - DP Naban (S Saravana Kumar with him); M/s Lee Hishammuddin Allen & Gledhill*

*For the respondent - Abu Tariq Jamaluddin (Marina Ibrahim with him); IRB*

*[Editor's note: For the High Court judgment, please see Positive Vision Labuan Limited Avenues Zone Inc v. Ketua Pengarah Hasil Dalam Negeri [2013] 1 LNS 459.]*

*Reported by Najib Tamby*

A

## JUDGMENT

**Aziah Ali JCA:**

**[1]** There were three appeals before this court. The appellant in Appeal No. W-01-67-02-2013 is Positive Vision Labuan Limited. The appellant in Appeal No. W-01-68-02-2013 is GA Investment Limited. The appellant in Appeal No. W-01-69-02-2013 is Avenues Zone Inc. In this judgment all the appellants will be referred to collectively as "the appellants".

**[2]** All the appellants are in the business of investment holding and have their office at Lot 2 & 3, Level 3, Wisma Lazenda, Jalan Kemajuan, 87000 Federal Territory of Labuan. The appellants are known as "Labuan companies" and "Labuan entities" under the Labuan Offshore Business Activity Tax Act 1990 (Act 445).

**[3]** It is common ground that the appellants are offshore companies having been incorporated under the Offshore Companies Act 1990. Positive Vision Labuan Limited, the appellant in Appeal No. W-01-67-02-2013 was incorporated on 22 March 2011. GA Investment Limited, the appellant in Appeal No. W-01-68-02-2013 was incorporated on 17 March 2011 and Avenues Zone Inc, the appellant in Appeal No. W-01-69-02-2013 was incorporated on 16 March 2011.

**[4]** The three appeals before us are in respect of the decision of the High Court which held that Labuan entities, like the appellants herein, which had made irrevocable elections under s. 3A of the Labuan Offshore Business Activity Tax Act 1990 ("the LOBATA") to be chargeable to tax under the Income Tax Act 1967 ("the ITA") instead of under the LOBATA, are not entitled to income tax exemption as provided under the Income Tax (Exemption) Order (No. 22) 2007 dated 18 December 2007 ("the exemption order") from the date of their respective elections.

**[5]** We had heard submissions by both parties and we had reserved our judgment. We have considered the submissions made and have given anxious consideration to the relevant legislative provisions and we have come to the conclusion that there is no merit in these appeals. We agree with the learned judge that the exemption order does not apply to the appellants with effect from the respective dates of their election. Accordingly we dismiss these three appeals with costs. We give our reasons below.

**[6]** For the purpose of clarity, we set out the background facts of the various legislative provisions relevant to these appeals and the salient background facts.

## Legislative Background

**[7]** On 18 December 2007 pursuant to s. 127(3)(b) of the ITA, the Minister of Finance made the exemption order which reads as follows:

INCOME TAX ACT 1967

INCOME TAX (EXEMPTION) (NO. 22) ORDER 2007

In exercise of the powers conferred by paragraph 127(3)(b) of the Income Tax Act 1967 [Act 53], the minister makes the following order:

Citation and commencement

1. (1) This order may be cited as the Income Tax (Exemption) (No. 22) Order 2007.

(2) This Order shall have effect from the year of assessment 2007 and subsequent years of assessment.

Interpretation

2. In this Order, unless the context otherwise requires:

"offshore trust" shall have the meaning assigned thereto by the Labuan Offshore Business Activity Tax Act 1990 [Act 445]; and

"offshore company" has the meaning assigned to it in the Labuan Offshore Business Activity Tax Act 1990.

Exemption

3. The Minister exempts from tax:

(a) dividends received by an offshore company; ...

**[8]** Then the Finance Act 2007 (Act 683) was enacted to amend amongst others, the ITA and the LOBATA.

## Amendments To The ITA

**[9]** Prior to Act 683, s. 3B of the ITA reads as follows:

> Non-chargeability to tax in respect of offshore business activity
>
> 3B. Notwithstanding section 3, tax shall not be charged under this Act on income in respect of an offshore business activity carried on by an offshore company.

Act 683 amended s. 3B of the ITA *vide* s. 4 to insert into s. 3B the words "other than an offshore company (in this Act referred to as "chargeable offshore company"), which has made an election under s. 3A of the Labuan Offshore Business Activity Tax Act 1990.". The amendment came into effect from the year of assessment 2008 and subsequent years of assessment (see s. 3 of Act 683). Pursuant to the amendment, s. 3B of the ITA reads as follows:

> Non-chargeability to tax in respect of offshore business activity
>
> 3B. Notwithstanding section 3, tax shall not be charged under this Act on income in respect of an offshore business activity carried on by an offshore company, other than an offshore company (in this Act referred to as "chargeable offshore company"), which has made an election under section 3A of the Labuan Offshore Business Activity Tax Act 1990.

## Amendments To The LOBATA

**[10]** Act 683 also amended s. 3 of the LOBATA *vide* s. 72 to insert after s. 3 a new s. 3A which came into effect from the year of assessment 2009 and subsequent years of assessment (see s. 70 of Act 683). Section 3 of the LOBATA reads as follows:

> Labuan business activity chargeable to tax
>
> 3. Subject to this Act, a Labuan entity carrying on a Labuan business activity shall be charged to tax in accordance with this Act for each year of assessment in respect of that Labuan business activity.

The new s. 3A(1) reads as follows:

> Labuan business activity chargeable to Income Tax Act 1967 upon election
>
> 3A. (1) Notwithstanding any other provision of this Act, a Labuan entity carrying on a Labuan business activity may make an irrevocable election in the prescribed form that any profit of

the Labuan entity for any basis period for a year of assessment and subsequent basis period to be charged to tax in accordance with the Income Tax Act 1967 in respect of that Labuan business activity.

(2) The election referred to in subsection (1) shall be made and furnished to the Director General three months after the beginning of the basis period for a year of assessment.

Provided that for the basis period ending on a day in the year of assessment 2008, the election under this section may be made and furnished before 1 August 2008.

Therefore under s. 3A(1) Labuan companies and Labuan entities are given the option to make an irrevocable election to be taxed under the ITA instead of under the LOBATA.

**[11]** Consistent with the new s. 3A of the LOBATA, Act 683 *vide* s. 71 inserted a new s. 2(3)(d) in the LOBATA which reads as follows:

(3) For the avoidance of doubt, it is declared that the provisions of the Income Tax Act 1967 shall apply in respect of:

(a) …

(b) (deleted)

(c) (deleted)

(d) a Labuan business activity carried on by a Labuan entity which makes an election under section 3A.

**[12]** The Finance Act 2011 (Act 719) *vide* s. 4 amended s. 2 of the ITA which came into force on 11 February 2010 (see s. 3(1) of Act 719). The amendments to s. 2 of the ITA read as follows:

(a) by inserting the following definitions:

"Labuan business activity" has the meaning assigned to it in the Labuan Business Activity Tax Act 1990 [Act 445];

"Labuan company" means a Labuan company incorporated under the Labuan Companies Act 1990 [Act 441] and includes a foreign Labuan company registered under that Act, Labuan limited partnership established and registered under the Labuan Limited Partnerships and Limited Liability Partnerships Act 2010 [Act 707], Labuan trust as defined

in the Labuan Trusts Act 1996 [Act 554] and a Malaysian bank as defined in the Labuan Financial Services and Securities Act 2010 [Act 704];

by deleting the definition of "offshore business activity"; and

by deleting the definition of "offshore company"; and

(b) by inserting a new subsection (10) as follows:

(10) Any reference in this Act to:

(a) "Labuan Offshore Business Activity Tax Act 1990" is construed as reference to "Labuan Business Activity Tax Act 1990";

(b) "Labuan Offshore Financial Services Authority" is construed as reference to "Labuan Financial Services Authority";

(c) "offshore business activity" is construed as reference to "Labuan business activity";

(d) "Offshore Companies Act 1990" is construed as reference to "Labuan Companies Act 1990"; and

(e) "offshore company" is construed as reference to "Labuan company".".

## Factual Background

**[13]** In the year of assessment 2011 the appellants each received dividends as follows:

| | |
|---|---|
| Positive Avenue Labuan Limited | : RM147,018,944 |
| GA Investment Limited | : RM 80,000,000 |
| Avenues Zone Inc | : RM 49,300,000 |

**[14]** On 15 June 2011, 30 May 2011 and 13 June 2011 respectively, the appellants made irrevocable elections under s. 3A of the LOBATA to be taxed under the ITA.

**[15]** By letter dated 16 January 2012 (pp. 190-191 appeal record) the appellants' tax consultants wrote to the respondent seeking confirmation that a Labuan company which had made an election under s. 3A of the LOBATA to be taxed under the ITA is exempted from income tax on dividends received by virtue of the exemption order.

**[16]** The respondent replied *vide* letter dated 20 June 2012 and informed the appellants' tax consultants that the Ministry of Finance has decided that, as a matter of policy, w.e.f. 12 February 2010 exemptions from tax under the ITA are no longer available to Labuan entities which had made elections under s. 3A of the LOBATA. Therefore the appellant's relevant branch which handles the appellants' files will take the appropriate action (pp. 188-189 appeal record).

**[17]** The appellants are dissatisfied with the decision of the respondent that the appellants do not qualify for exemption under the exemption order. On 27 July 2012 the appellants individually filed similar judicial review applications under O. 53 of the Rules of the High Court 1980 (as it was known then).

**[18]** On 2 August 2012 the respondent issued notices of assessment against each appellant for tax payable as follows:

| | | |
|---|---|---|
| (a) | Positive Vision Labuan Limited | RM36,754,986 |
| (b) | Avenues Zone Inc | RM24,650,000 |
| (c) | GA Investment Limited | RM20,361,839.25 |

**Judicial Review**

**[19]** In the applications for judicial review the appellants sought for *inter alia* the following reliefs:

(a) An order of *certiorari* to move into this Honourable Court for the purpose of it being quashed the decision of the respondent on 20 June 2012 ruling that the applicant does not qualify for exemption from income tax under the Income Tax (Exemption) Order (No. 22) 2007 from 12 February 2010 ("decision");

(b) A declaration that the applicant qualifies for the exemption from income tax under the Income Tax (Exemption) Order (No. 22) 2007 and accordingly the dividends received by the applicant in the year of assessment 2011 and subsequent years of assessment shall be exempted from income tax;

(c) A declaration that the respondent's decision is illegal and unconstitutional and thus, the decision is null and void and accordingly, the dividends received by the applicant in the year

of assessment 2011 and subsequent years of assessment shall be exempted from income tax under the Income Tax (Exemption) Order (No. 22) 2007.

**[20]** The issue for determination by the High Court was whether the respondent was correct in law to disallow the tax exemption to the appellants under the exemption order.

**[21]** In the appellants' affidavit in support of the application for judicial review, the appellants claim that the respondent has failed to take into account *inter alia* the following matters in arriving at its decision:

(a) the 2007 order is still in effect;

(b) the 2007 order continues to exempt dividends received by the appellants;

(c) it is incumbent on the respondent to give effect to the will of the legislature;

(d) the 2007 order does not provide the respondent or the Minister of Finance any power to prescribe a time frame as to its application;

(e) the respondent or the Ministry of Finance has no jurisdiction to unilaterally and arbitrarily declare 12 February 2010 as the cut-off date for the appellants to claim tax exemption for its dividend income;

(f) the policy of the Ministry of Finance as alleged by the respondent was not issued pursuant to any power given by the law and it has no force of law;

(g) the respondent's decision not to accord the benefits of the 2007 order based on the policy of the Ministry of Finance is an error of law as the policy contravenes the clear words of the 2007 order and the express intention of the legislature;

(h) the respondent's decision, which in any event has no legal basis, cannot be applied retrospectively to deprive the appellants of rights acquired under the 2007 order.

**[22]** It was the appellants' contention that the respondent had no legal basis for denying the tax exemption clearly allowed by law. Accordingly it was submitted that the respondent had no legal

authority to implement a policy based on the ground of equity and by implementing the said policy, the respondent clearly lacked jurisdiction and had acted *ultra vires*.

**[23]** For the respondent it was submitted that prior to the exemption order, s. 3 of the LOBATA provides that an offshore company shall be charged to tax under the LOBATA. Likewise prior to its amendment *vide* the Finance Act 2007 ("Act 683"), s. 3B of the ITA had also provided that offshore companies are not chargeable to tax under the ITA. However s. 3B of the ITA was amended by Act 683. Pursuant to the amendment, under s. 3B of the ITA an offshore company which had made an election under s. 3A of the LOBATA is referred to as a "chargeable offshore company".

**[24]** It is submitted that under s. 3B of the ITA, an "offshore company" is an offshore company taxed under the LOBATA but a "chargeable offshore company" is an offshore company which has made an election to be taxed under the ITA. The appellants are "chargeable offshore companies". The exemption order applies to "offshore companies". Based on the clear words of s. 3B of the ITA, the respondent submitted that the appellants are no longer "offshore companies" entitled to the exemption from income tax under the exemption order.

**Decision Of The High Court**

**[25]** The learned judge in her grounds of judgment held that (pp. 48-49 appeal record):

(a) s. 3B of ITA makes it clear that companies which have elected to be taxed under ITA are not covered by the exemption order;

(b) once election is made, the applicants are no longer eligible for the exemption;

(c) there is no notification in the Gazette of the cut-off date;

(d) by virtue of art. 96 of the Federal Constitution, the respondent cannot simply fix the cut-off date which results in the appellants now being subject to tax, without at least making it an order in the Gazette;

(e) the law is clear that once an election is made, the exemption order no longer applies;

(f) the exemption order takes effect from the date of election. Prior to that date, the appellants were still entitled to get the exemption.

Consequently the learned judge quashed the decision of the respondent as stated in the respondent's letter dated 20 June 2012 to the extent that the appellants are liable to be taxed under the ITA with effect from their respective dates of election. Dissatisfied with the decision of the learned judge, the appellants appealed to this court.

## The Appeal

**[26]** Before us, the appellants posed the following issue for our determination:

> whether the learned High Court judge had erred in law in ruling that the appellants are not entitled to the income tax exemption provided under the Income Tax (Exemption) (No. 22) Order 2007 upon the appellants making the irrevocable election to be taxed under the Income Tax Act 1967.

## Appellants' Case

**[27]** Learned counsel for the appellants submits that the exemption order applies to all offshore companies that come within the meaning assigned under the LOBATA. Having elected to be taxed under the ITA, the dividends received by the appellants are subject to income tax but, by the 2007 order, the Minister of Finance has exempted offshore companies from income tax under the ITA in respect of dividend income. It is submitted that both s. 3B of the LOBATA and s. 3A of the ITA do not affect the application of the 2007 order. The respondent's decision not to accord the benefits of the exemption order based on the policy of the Ministry of Finance contravenes the said order and amounts to an error of law and the decision is *ultra vires*, illegal, void, unlawful and/or in excess of authority.

**[28]** In respect of s. 3B of the ITA, in the written submissions the appellants contend *inter alia* that:

(a) section 3B of the ITA does not make any reference to the exemption order and does not restrict offshore companies which have elected to be taxed under the ITA to be eligible for the exemption;

(b) section 3B of the ITA merely describes an offshore company that has elected to be taxed under the ITA as a "chargeable offshore company". The description of chargeable offshore company does not in any manner alter the meaning of offshore company ascribed in the exemption order or the term Labuan company. Neither does the Hansard nor the explanatory notes to the Finance Bill 2007 suggest that the amendment to s. 3B of the ITA was to create separate category of offshore company known as "chargeable offshore company". Instead, the amendment to s. 3B was to enhance the competitiveness of Labuan as an attractive financial centre;

(c) in any event, insofar as the exemption order is concerned, the term "offshore company" is in reference to the LOBATA, and the term "offshore company" in the LOBATA makes no distinction drawn between an offshore company taxed under the ITA or the LOBATA. It must be further noted that the amended s. 3B of the ITA and s. 3A of the LOBATA were gazetted on the same day as the exemption order. If Parliament had intended to restrict the exemption order, it requires no feat of imagination of the draftsman to exclude offshore companies that have elected to be taxed under the ITA to not come within the exemption order;

(d) the exemption order applies to all or any offshore company, notwithstanding whether it is taxed under the LOBATA or ITA. The exemption order cannot be restricted to an offshore company taxed under the ITA as the purpose of the exemption order is to grant exemption from income tax under the ITA;

(e) the exemption order makes no reference whatsoever to either s. 3B of the ITA or s. 3A of the LOBATA in determining whether the appellants were entitled to the income tax exemption.

**[29]** It is submitted that the language used in the exemption order and the ITA is clear in that:

(a) The dividend received by offshore companies like the appellants are exempted from income tax under the exemption order and

(b) Section 3B of the ITA does not make any reference to the exemption order and does not restrict companies which have elected to be taxed under the ITA to continue to enjoy exemptions under the exemption order.

**[30]** Learned counsel submits that the exemption order does not state that the exemption excludes offshore companies that have elected to be taxed under the ITA. It is submitted that given that the appellants are taxed under the ITA, there is compelling reason for the exemption order, which was also made under the ITA, to also apply to the appellant. The exemption order is in effect and continues to exempt from tax dividends received by the appellants. Further the exemption order refers to offshore company as an offshore company as defined under the LOBATA, not the ITA. Thus it is submitted that it is puzzling as to how the learned judge reached the conclusion that s. 3B of the ITA makes it clear that companies which have elected to be taxed under the ITA are not covered by the exemption order. According to learned counsel, in reaching such conclusion, the learned judge is effectively rewriting the effect of the exemption order by reading that s. 3B of the ITA excludes the availability of the exemption order to the appellants. The learned judge has erred in construing that an election under s. 3B of the ITA results in an offshore company no longer covered by the exemption order.

**Respondent's Case**

**[31]** For the respondent learned revenue counsel submits that s. 3B of the ITA as amended clearly established the fraction of an offshore company into "an offshore company" and "chargeable offshore company". Under s. 3B a "chargeable offshore company" refers to an offshore company that has made an election under s. 3A of the LOBATA to be taxed under the ITA. It is submitted that having made the election under s. 3 of the LOBATA, the appellants are no longer "offshore companies" per se but are "chargeable offshore companies" and are chargeable to tax under the ITA. Since the appellants are no longer "offshore companies" therefore the appellants are excluded from the exemption order. Learned revenue counsel submits that as the provisions of the law are clear and do not admit of any ambiguity, they must be strictly interpreted.

## Our Decision

**[32]** It is clear that the resolution of the issue posed for our determination involves the interpretation of the provisions of the ITA, the LOBATA and the exemption order.

**[33]** In considering the various legislative provisions, we have been referred to the principle as stated by Rowlatt J in the case of *Cape Brandy Syndicate v. Inland Revenue Commissioners* [1921] 1 KB 64; 12 TC 358 as follows:

> ... in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used ... .

**[34]** However we also refer to the case of *Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265, where Steve Shim CJ (Sabah & Sarawak) said *inter alia* as follows:

> With respect, the principle of strict interpretation of statutes enunciated by Rowlatt, J could not be regarded as the *locus classicus* on the issue.

In his judgment Steve Shim CJSS referred to the judgment of Lord Wilberforce in *WT Ramsay Ltd v. Inland Revenue Commissioners* [1982] AC 300 where he said as follows:

> A subject is only to be taxed on clear words, not on 'intendment' or on the 'equity' of an Act ... What are 'clear words' is to be ascertained on normal principles; these do not confine the courts to literal interpretation. They may, indeed should, be considered in the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded ...
>
> This is known as the Ramsay Principle. While clear words are needed before a tax can be imposed, what those words are would be interpreted in line with the purposive approach.

In the same case Haidar Mohd Noor, CJ (Malaya) said that s. 17A of the Interpretation Acts 1948 and 1967 is a statutory recognition for the courts to take a purposive approach in the interpretation of statutes including taxing statutes. The case of

*Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* is thus authority that the court is under a duty to adopt an approach that promotes the purpose or object underlying a particular statute including taxing statutes.

**[35]** We further refer to the case of *Generation Products Sdn Bhd v. Majlis Perbandaran Klang* [2008] 5 CLJ 417 (FC), where it is held that a statute has to be read in the correct context and the interpretation of the meaning of the statutory words used should coincide with what Parliament meant to say. In that case *Zaki Tun Azmi*, PCA said as follows:

> I am drawn to the House of Lords judgment of Lord Simon of Glaisdale, in *Farrell v. Alexander* [1976] 2 All ER 721, at pp. 735-736, where he discussed the question of reading the statute in the correct context:
>
> Since the draftsman will himself have endeavoured to express the parliamentary meaning by words used in the primary and most natural sense which they bear in that same context, the court's interpretation of the meaning of the statutory words used should thus coincide with what Parliament meant to say.
>
> ....
>
> The first or 'golden' rule is to ascertain the primary and natural sense of the statutory words in their context, since it is to be presumed that it is in this sense that the draftsman is using the words in order to convey what it is that Parliament meant to say. They will only be read in some other sense if that is necessary to obviate injustice, absurdity, anomaly or contradiction, or to prevent impediment of the statutory objective. It follows that **where the draftsman uses the same word or phrase in similar contexts, he must be presumed to intend it in each place to bear the same meaning**. (emphasis added)

**[36]** In ascertaining legislative intent in the interpretation of a statute, reference must be made to the words appearing in the statute for, *prima facie*, every word appearing in a statute must bear some meaning. This is clearly explained by the Federal Court in the case of *Krishnadas Achutan Nair & Ors v. Maniyam Samykano* [1997] 1 CLJ 636 as follows:

> The function of a Court when construing an Act of Parliament is to interpret the statute in order to ascertain legislative intent primarily by reference to the words appearing in the particular enactment. *Prima facie*, every word appearing in an Act must bear

some meaning. For Parliament does not legislate in vain by the use of meaningless words and phrases. A judicial interpreter is therefore not entitled to disregard words used in a statute or subsidiary legislation or to treat them as superfluous or insignificant. It must be borne in mind that:

> As a general rule a Court will adopt that construction of a statute which will give some effect to all of the words which it contains. per Gibbs J in *Beckwith v. R* [1976] 12 ALR 333, at p. 337.

**[37]** Reverting to the present appeal, in considering s. 3B of the ITA, we find that it is clear that through the amendments made, Parliament intended to distinguish between an offshore company which has made the election under s. 3A(1) of the LOBATA as opposed to those companies which did not. It is clear that the words "chargeable offshore company" refer to offshore companies which had made the election.

**[38]** A statutory provision intending to withdraw an exemption should be stated clearly leaving no room for doubt as to its meaning (*National Land Finance Co-Operative Society Ltd v. Director General of Inland Revenue* [1993] 4 CLJ 339; [1993] 4 BLJ 33; [1994] 1 MLJ 99). We do not find any ambiguity as to the meaning of s. 3B. Section 3B clearly provides that "chargeable offshore companies" are subject to tax under the ITA.

**[39]** Insofar as the exemption order is concerned, this order is a statutory order made under power delegated to the Minister. Being an order made under delegated power, the exemption order must necessarily be read subject to and consistent with the provisions of the substantive or parent Act. The exemption order is clear in that it applies only to "offshore company" which must be interpreted as defined under the ITA.

**[40]** In *Muthukamaru Veeriah v. Pemungut Duti Harta Pusaka* [2003] 4 CLJ 561 this court had opportunity to state through the judgment of Mohd Ghazali Yusoff JCA as follows:

> If one is claiming exemption under a statute, one must fall clearly within the words of the statute.

We find that with effect from the date the appellants made their respective elections, the appellants are "chargeable offshore companies" and are therefore no longer within the terms of the

exemption order. The appellants have failed to show that the exemption order applies to them. In our considered view the interpretation of the ITA and the exemption order as suggested by the appellants would mean that Labuan companies which had elected to be taxed under the ITA could also claim exemption from being charged to tax under the ITA on the basis of the exemption order. Surely this cannot be the intention of Parliament. In our view such an interpretation is absurd.

**[41]** We agree with the learned judge that the exemption order no longer applies to the appellants effective from the respective dates of election. Having considered the various legislative provisions above and in particular Act 719, we find that the date 11 February 2010 determined by the Ministry of Finance as being the date when the exemption order no longer apply to "chargeable offshore company" is neither unreasonable nor contrary to the ITA.

**[42]** For the reasons stated above, we dismiss the three appeals with costs of RM30,000 for all the three appeals as prayed for by the respondent. We affirm the decision of the High Court.